IN THE HIGH COURT OF BOMBAY AT GOA

APPEAL FROM ORDER NO. 25/2004
AND
CIVIL APPLICATION NO. 128/2004

Mr. Aster Francis George,
16 years old, r/o. Kuwait,
thorough his natural guardian
moth Peggy George, Flat No.G-2,
B-Building Tonca,
Caranzalem, Ilhas, Goa. ..... Appellant.

V/s.

1. Mrs. Antonia Iria Rodrigues e George
r/o. of Flat No. G-2, B-Building,
Palm Grove Housing Society,
Tonca, Caranzalem, Ilhas, Goa.

2. PALM GROVE CO-OPERATIVE HOUSING
SOCIETY LIMITED,
Palm Grove Apartments, B-Building,
1st Floor Tonca,
Caranzalem, Goa. ..... Respondents.

Mr. Valmiki Manezes, Advocate for the appellant.

Mr. A. F. Diniz, Advocate for the respondent No.1.

Mr. V.K. Bodke, Advocate for the respondent No.2 – absent.

CORAM : P.V. KAKADE, J.

DATE : 16TH NOVEMBER, 2006.

ORAL JUDGMENT :

Heard learned Counsel for both the parties. Perused the record.

2. The unsuccessful plaintiff in the interim proceeding has come in appeal taking exception to the order passed by the Civil Judge, Sr. Division, Panaji who has rejected the application for temporary injunction.

3. The plaintiff came with a case that the suit flat was allotted to him in the Inventory Proceeding No.50/93 held upon death of his father. The plaintiff further claimed that he is in possession of the suit flat as owner. The plaintiff further contended in the suit that the defendant No.1 was intending to dispose of the suit flat to the prospective buyer and if the flat sold, there would be multiplicity of proceedings and creation of third party interest in the suit flat which would affect valuable right created in favour of the plaintiff by the inventory proceeding which has attained finality and hence, the suit came to be filed, seeking limited relief to the effect that the defendants should be restrained from selling, alienating, renting leasing, sub-letting, or creating third party interest in whatsoever manner or allowing any other person or persons to occupy the premises on leave and licence basis or remove or take away or dispose of the household articles from the suuit flat.

4. The defendants contested the application on various counts and sought its dismissal. The learned trial Judge, after hearing both the parties, came to the conclusion that no independent suit would lie of this nature, as by virtue of Article 90 of the Portuguese Civil code, he was required to move the Inventory Court in execution of the said order under which he had obtained the rights to the suit flat. The learned trial Judge also sought to rely upon the Judgment of this Court in support of the said version and on such and other counts, without touching to the merits of the matter, the application for temporary injunction came to be rejected. Hence, the appeal.

5. After hearing both the parties, it is to be noted that a preliminary objection was raised on behalf of the respondents to the effect that the document of power of attorney filed on record at the time of filing of this appeal is defective in nature and, therefore, the appeal was not properly authorised and had to be dismissed at the threshold. Initially, the document of power of attorney was in respect of the right given which was executed by Peggy George i.e. the mother of the present appellant and not the appellant himself. However, obviously when the mistake was realised, ratification by way of further general power of attorney came to be executed in order to remove the said defect.

6. The learned Counsel for the respondents has strongly objected to this aspect relying upon the provisions of Section 200 of the Contract Act whereunder ratification of unauthorised act cannot injure third person. He has relied upon the judgment of this Court in the case of ***College of Engineering of Yeshwant Rural Education Society, Sewagram, Dist. Wardha, through Chairman and another vs. Mrs. Asmita Basole and anr.,*** Mah. L.J. 676 in support of his submission that such a ratification was contrary to the provision of Section 200 as it was affecting his rights involved in the matter and, therefore, the appeal itself is required to be discarded at the initial stage. However, in this regard, it must be noted that the provision of Section 200 stipulates that such ratification would be rendered illegal if the authority would have the effect of subjecting a third person to damages, or of terminating any right of interest of a third person. In the present case before us what is sought to be done is to make correction of obvious irregularity which occurred in the format of general power of attorney. There is no question of damage or affect of right of the third person is involved because what is sought to be asserted in this appeal is the right created by a party i.e. the appellant by virtue of legal mandate given in his favour and, therefore, in my considered view, this Court would not be justified in standing on technicalities by discarding the appeal memo at the threshold only on the ground that there occurred any

defect in format of the general power of attorney. Thus, I hold that this cannot go in favour of the respondents.

7. Turning to the merits of the matter, it must be noted that Article 90 of the Portuguese Civil Code is on par with the provision of Section 47 of the Code of Civil Procedure which stipulates that all matters pertaining to the execution of the decree shall be adjudicated in the course of execution and not by separate independent suit. Similar is the provision of Article 90 of the Portuguese Civil Code. However, in the present case, it is to be seen that the entire inventory proceeding is concluded and has attained finality. The right in favour of the appellant, qua the suit flat, has accrued by virtue of the concluded inventory proceeding. Moreover, it is to be noted that the respondent was not a party to the said inventory proceeding and, therefore, by any stretch of imagination it cannot be said that the suit is part and parcel of the execution of the decree. In other words, what is sought to be established on behalf of the appellant is exclusive right accrued by virtue of the inventory proceeding in respect of the suit flat and, therefore, the substantive suit is maintainable for the purpose of getting his rights ratified.

8. Since the lower Court has not touched the merits of the matter,

we are required to see whether there is any prima facie case made out by the plaintiff-appellant in this case. The very fact that by virtue of inventory proceeding the appellant has obtained exclusive right to the suit flat itself, is, in my view, sufficient to show that he has established his prima facie case against the defendants who is said to be in possession of the said flat, obviously without mandate of law and, therefore, I hold that the plaintiff has proved his prima facie case.

9. Once we reach this conclusion, the question of balance of convenience and the doctrine of irreparable injury have to go in favour of the appellant. Under the circumstances, I am inclined to allow the appeal with certain modification in prayer clause of the application for temporary injunction in the interest of both the parties.

11. Hence, the appeal is allowed. The application for temporary injunction made by the plaintiff is allowed to the extent that during the pendency and final disposal of the suit, the defendant shall stand restrained from selling, alienating, renting, leasing, sub-letting, or creating third party interest in whatsoever manner or allowing any other person to occupy the premises on leave and licence basis. It is clarified that the question regarding ownership of household items is left to the decision of

the trial Court while the matter is adjudicated finally at the stage of hearing. The observations made hereinabove are subject to the merits to be adjudicated at the time of final hearing. With these observations, the appeal stands disposed of with no order as to costs.

In view of the disposal of the appeal itself, the civil application also stands disposed of with no order as to costs.

P.V. KAKADE, J.

ssm.